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New York Supreme Court
Appellate Division: First Department

NYC Organization of Public Service Retirees, Inc., Lisa Flanzraich, Benay Waitzman, Linda Woolverton, Ed Ferington, Merri Turk Lasky, and Phyllis Lipman,

Plaintiffs-Respondents-Appellants,

against

Renee Campion, City of NY Office of Labor Relations, and City of New York,

Defendants-Appellants-Respondents.

Case No. 2022-01006

REPLY MEMORANDUM IN SUPPORT OF MOTION FOR A PREFERENCE AND EXPEDITED CONSIDERATION

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March 23, 2022

TABLE OF CONTENTS

Page(s)

PRELIMINARY STATEMENT

The following is undisputed: (1) the order below upends an agreement between the City and municipal unions to roll out a new cost-free healthcare plan for certain retirees, the Medicare Advantage Plus Plan; (2) the order is flawed and requires this Court's intervention, though the parties disagree about why; and (3) the City perfected its appeal at the earliest opportunity, just 18 days after the order issued, putting this matter on the June Term.

At its core, the motion seeks modest relief: to retain these appeals on the June Term. Petitioners, who claim to represent all municipal retirees but in fact are just six of them and a litigation vehicle, offer no good reason to deny that relief and delay the case more than three months. Instead, they note that under the Court's standard June Term calendar, the deadline to file their first brief falls during counsel's days of religious observance (or, in one case, a vacation) under what they call a "strained schedule"—the briefing schedule the Court imposes for all litigants on the June Term.

Petitioners' excuses do not justify the delay they desire. At most, the cited days of religious observance and vacation impact

only the last few days of the 30-day period given for petitioners' first brief under the standard term deadlines. Petitioners have three attorneys listed on the docket. Moreover, their respective firms consist of at least 50 attorneys, and petitioners make no assertions at all about those other attorneys' availability.

On the other hand, maintaining these appeals on the June Term is strongly in the public interest. Each month that the Medicare Advantage Plus Plan's rollout is delayed, the City's taxpayers lose $50 million in savings forever, threatening a healthcare fund that protects employees and retirees and increasing the risk of cutbacks to other healthcare programs. Delay also denies hundreds of thousands New York City retirees the clarity they need in advance of healthcare enrollment in the fall.

FURTHER REASONS TO GRANT A PREFERENCE AND EXPEDITED CONSIDERATION

The City respectfully requests that these appeals be maintained on the June Term and resolved as promptly as possible following argument in that term. Petitioners' desire to delay the resolution of this case is not a reason to exact profound financial penalties on the City's taxpayers. Although petitioners' opposition is

predictable, it is hard to square with the realities of this case: each month petitioners force delay, the City foregoes millions in potential savings and retirees receive no clarity as to their long-term healthcare options.

The religious observance and vacations of petitioners' counsel should not prevent them from filing a brief on April 20 in accordance with this Court's June Term calendar. To begin, there are three attorneys on the appellate docket—none of whom are solo practitioners. In fact, together the firms representing petitioners employ over 50 attorneys.[1] We recognize that many observant Jews are prohibited from working on the first two days of Passover—here, a weekend—as well as the last two days, which fall after the relevant deadline.

But petitioners nonetheless have ample time to prepare their first brief. Even considering only the time before Passover begins, the period between March 21, when the City perfected, and sundown on April 15, Passover's start, is about a week longer than the

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[1] *See* Walden Macht & Haran, *Professionals*, https://wmhlaw.com/professionals/ (last visited Mar. 23, 2022); Pollock Cohen LLC, *Our Team*, https://www.pollockcohen.com/pc-team (last visited Mar. 23, 2022).

City had to perfect its appeal. And, while the issues here may be "weighty" (Opp'n 3), they are also nothing new for petitioners' counsel, who briefed them at length below.

Petitioners understandably relegate their list of other upcoming matters to a footnote, for it is decidedly underwhelming, especially given that it covers three attorneys. The list leads with a reference to an appellant's case in this Court where the six-month perfection deadline runs in mid-April, without addressing the availability of a first enlargement, particularly where the appeal could not now be heard until the September Term at the earliest. After that first entry, petitioners list two *May* dates and cite discovery issues in a fourth case without noting any deadlines at all. The list is all but irrelevant to petitioners' April 20 deadline here.

Nor does maintaining this matter on the June Term mean, as petitioners argue, that the Court will have to rule on a complex case based on rushed briefing. The Court has structured its June Term calendar as it is for a reason: it provides a uniform amount of time for all practitioners and makes the briefing schedule clear to all.

Petitioners face no unfairness from having to file a brief on the same schedule as everyone else.

More than merely good cause, there are multitudes of reasons to maintain this case on the June Term—at least 150 million of them. As "alarmist" as those lost savings may sound to petitioners (Opp'n 5), that *is* what's at stake. The planned transition to the Medicare Advantage Plus Plan is projected to save the City $600 million annually, or $50 million per month, as the result of federal subsidies available only to Medicare Advantage plans (Levitt Aff. ¶ 25, NYSCEF No. 118; Sorkin Aff. ¶ 12, NYSCEF No. 76). In turn, the loss of such savings will threaten the Health Insurance Stabilization Fund, a fund which benefits petitioners as well as thousands of other retirees. Although this may be a case of "monumental significance" (Opp'n 4), that is not a reason to delay these appeals. It is instead a reason to maintain them on the June Term.

In addition to the drastic fiscal impact of petitioners' requested delay, the delay would prevent the City from addressing uncertainty as to the plans that will be available to Medicare-eligible individuals in the future, including during the next open

enrollment period in the fall. Achieving such clarity for retirees is another strong reason to keep the appeals on the June Term.

Petitioners miss the point in countering that the current status quo has existed for years. As the City has shown, those years have seen the City's healthcare costs—including costs for retiree healthcare—spiral dramatically. The City has spent many of these years working closely with municipal unions to address the looming fiscal crisis—first by addressing the healthcare arrangements for active employees, and then by crafting the Medicare Advantage Plus Plan for retirees so as to tap into available federal subsidies more effectively. That careful and lengthy process does not render further and unnecessary delays insignificant—quite to the contrary. Nor does it validate petitioners' tactical bristling over the City's modest request for the Court to maintain the appeals on their current term.

Petitioners also claim that the City breached both professional courtesy and Appellate Division rules by not consulting them on a joint record and joint briefing schedule (Opp'n 2). But they are standing on ceremony. The City reproduced the full record, not a

selective appendix, including every document enumerated at the outset of Supreme Court's order, with the exception of documents that should be omitted from the record, like memoranda. Under those circumstances, the rule referring to a "joint record" for cross-appeals is mainly about cost-sharing. And while petitioners claim that the filed full record omits "key parts of the record," they have offered no hint what those might be (Opp'n 3 n. 3).

To the extent petitioners complain about the lack of a joint briefing schedule, the briefing schedule is set by the Court's June Term calendar. And the City had no real choice but to perfect its appeal for June, given the public monies and interests at stake. That is why the City perfected just 18 days after the order below issued, and why the City is prepared to file its upcoming responding/reply brief on the term schedule's compressed nine-day timetable for doing so. After all, it is the lead appellant—not the cross-appellant—whose briefing time is particularly constrained under that schedule. Perfecting for the June Term, and seeking to maintain the appeals on that term, was the City's only reasonable option.

At the same time, it was equally clear—and is now confirmed by this motion practice—that petitioners would likely aim to put the matter off. Indeed, petitioners' opposition openly floats a 30-day delay of the briefing schedule, knowing that it would push the appeals by more than three months to the September Term. That is a delay to which the City never could have stipulated. And in the end, of course, petitioners' process quibbles do nothing to change the grave public impact that delay would have for the City, its taxpayers, and its retirees.

CONCLUSION

The Court should (a) grant a preference in the hearing of these appeals to the extent of maintaining them on the June Term, with no adjournments to be had; (b) calendar argument for that term; and (c) expedite a decision on the appeals.

Dated: New York, New York
March 23, 2022

Respectfully submitted,

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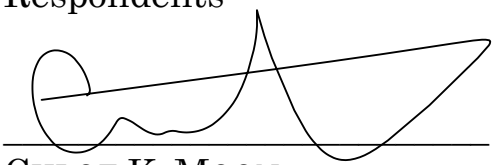
By: 
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